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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

SOUTHERN NATURAL GAS COMPANY,
Petitioner,

v.

JOSEPH F. FRITZ, G. B. "BOOTS" SMITH CORPORATION, CHALLENGER DEEP WELL SERVICES, INC., H. LANIER B. FOOTE and EXXON CORPORATION,
Respondents.

REPLY TO BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

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REPLY TO BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS *AMICI CURIAE*

Petitioner, Southern Natural Gas Company ("Southern"), files this brief pursuant to Rule 22.6 in response to the brief of the United States and Federal Energy Regulatory Commission ("FERC" or the "Commission") as *Amici Curiae.*

ARGUMENT

In its brief, the Commission suggests to the Court three possible avenues to decide this case. First, it urges the Court to summarily vacate the Mississippi Supreme Court decision and remand for reconsideration in light of the Commission's decision in essentially the same case now on appeal to the United States Court of Appeals for the Fifth Circuit. *Southern Natural Gas Co.*, No. GP83-35-000, 40 FERC ¶ 61,225 (1987), *reh. denied*, 43 FERC ¶ 61,454 (1988), *appeal docketed sub nom., Fritz v. FERC*, No. 88-

4410 (5th Cir. June 15, 1988). Second, the Commission urges the Court to defer consideration of the petition pending the Fifth Circuit's final decision. Third, the Commission suggests that the Court deny certiorari for an asserted lack of "any important and unresolved question of federal law."

Of the options presented by the Commission, only the last is without merit. The first option, summary reversal and remand to the Mississippi Supreme Court, has been suggested by Southern as a possible remedy. Petitioner's Reply Brief at 3. The second option, also suggested as a remedy by Southern, is, however, the one that will give the most complete disposition of this case in the shortest time and with the least expenditure of judicial effort. Therefore, Southern strongly urges that should the Court elect not to grant certiorari immediately, it should defer consideration of the petition pending the final outcome of the appeal from the FERC. If the Fifth Circuit affirms, then certiorari should be granted.

I. The Best Course of Action is to Defer Consideration of The Petition Pending a Final Decision by The Fifth Circuit.

One course of action suggested by the Commission is to defer consideration of the petition pending the Fifth Circuit's decision in *Fritz v. FERC*. This is the course of action most strongly urged by Southern because it is the quickest, most efficient and best procedure for handling this case. First, it does not involve remanding the case for reconsideration to a court which has already once ignored binding Commission precedent. Second, it involves far fewer steps in the judicial arena. The Fifth Circuit case should proceed no matter what decision is rendered by this Court, and may be appealed to this Court. If the Fifth Circuit affirms, then there would exist an irreconcilable conflict between a state supreme court and a circuit court of appeals. By then granting certiorari, this Court would have the opportunity to consolidate all appeals at one place at one time to ultimately decide the questions at hand.

II. It Would Be Appropriate to Vacate and Remand the Mississippi Supreme Court Decision.

The course of action most strongly suggested by the Commission is to grant certiorari, vacate and remand the decision of the Mississippi Supreme Court for reconsideration in light of the FERC's decision in *Fritz v. FERC*. Despite the fact that the Mississippi Supreme Court has already had one opportunity to conform its decision to that of the Commission and has refused to do so, Southern believes that this may be an appropriate way to proceed, provided that this Court's order directs the Mississippi Supreme Court to follow Commission precedent. As noted above, this course may not be as judicially efficient as deferring consideration, but will nevertheless serve to provide the Mississippi Court an opportunity to correct its error.

III. Because a Question Meriting Certiorari is Presented by This Appeal, the Commission's Final Suggested Course of Action Should Not Be Followed.

The Commission's last suggestion is to deny certiorari for want of an important federal question. This suggested approach, however, wholly fails to address the important legal issues raised by this appeal and also fails to persuasively address the practical problems raised by this appeal.

A. The Legal Questions Raised Do Merit Revew.

The first legal question raised by this appeal is whether a state court should defer to a decision of a federal administrative agency interpreting its own regulations in a case involving the same facts, the same contract, the same legal issue, and substantially the same parties. This appears to be a question of first impression. Agency decisions are entitled to "controlling weight" and "great deference" even in instances where there is not the identity of facts and issues involved herein. Therefore, at a minimum, such deference would be appropriate herein. The Commission agrees, stating: "the Mississippi Supreme Court was [not] free to ignore the Commission's decision once it is issued.

In sum, that court plainly erred by not deferring to FERC's interpretation of Regulation 270.207." FERC Brief at 15.

The Commission wholly fails to explain why the Mississippi Supreme Court's refusal to follow controlling precedent from the FERC does not create a conflict meriting review by this Court. The Commission also fails to demonstrate that this is not a question of first impression. Therefore this case does involve a legal issue meriting review.

The second legal issue in this appeal involves Section 270.207. Even the FERC acknowledges that the legal questions raised by its promulgation and enforcement of Section 270.207 may merit review by this Court. FERC Brief at 15. However, the FERC suggests that review should be more appropriately exercised on appeal from the Fifth Circuit. The plain and simple fact is that the Mississippi Supreme Court, rightly or wrongly, did make a decision on the Section 270.207 issue. Why it is inappropriate for the Court to consider that issue on appeal from the Mississippi Supreme Court but appropriate on appeal from the Fifth Circuit is not explained by the FERC.

B. The Practical Problems Raised by FERC Do Not Foreclose Review.

As noted above, the FERC fails to put forward any argument as to why the legal issues presented in this appeal are inappropriate for review by this Court. The FERC does, however, advance several practical reasons why it believes full review to be inappropriate. However, none of these reasons should detain the Court, particularly since they deal largely with what might happen in the future instead of the certain problem that faces Southern now.

1. Reversal By The Fifth Circuit May Ultimately Moot The Appeal But The Mere Possibility of Reversal Will Not.

While acknowledging that Southern finds itself caught between directly conflicting decisions, the Commission

notes that the conflict assumes "real significance for Southern" only if the Fifth Circuit ultimately upholds the Commission's decision. In Southern's Motion to Defer Consideration, it recognized that if the Fifth Circuit were to reverse the Commission and to render a decision conforming precisely to that of the Mississippi Supreme Court, then that basis of Southern's appeal would disappear. However, unless and until the Fifth Circuit reverses the FERC, there is a conflict which merits review. It would be clearly inappropriate to deny certiorari simply because the Fifth Circuit might moot the existing conflict.

2. Even if FERC Might Not Impose Sanctions for Unlawful Conduct, the Conduct is Still Unlawful.

The FERC says "even if FERC's order is ultimately upheld, the Commission has discretion whether or not to institute enforcement proceedings against petitioner for complying with the state court's mandate." FERC Brief at 15. Here we have an agency of the federal government charged with promulgating and enforcing laws pertaining to the sale of natural gas. That agency has directly and unequivocally ruled that the payment in question would violate the law. Nevertheless, that same agency is now taking the position that Southern is not placed in a difficult position because the Commission *might* not impose sanctions on Southern. The fallacies with this argument are patent. First, the question of whether or not the Commission will ultimately impose sanctions for violating the law fails to address the most fundamental problem—that payment as mandated by the Mississippi judgment would violate the law. It is ludicrous for a federal agency to rule, on the one hand, that certain action would be unlawful but to suggest, on the other hand, that a party should go ahead and violate the law simply because the Commission might not impose sanctions.

Second, that the FERC might not impose sanctions also means that it might sanction Southern. The first time the Commission construed this regulation was in the *Columbia*

proceeding.[1] In that case the Commission initially sent the matter to its Division of Enforcement to determine whether civil or criminal sanctions should be imposed for a knowing violation of the law. 26 FERC at ¶ 61,123-24. After the decision in *Columbia* had been announced, Southern had serious and legitimate concerns that its payment would constitute a knowing violation of the law, possibly subjecting it to civil and/or criminal penalties. Additionally, all of the factors which the Commission now says might militate against imposition of sanctions, FERC Brief at 15, were all before the Commission when it initially decided that the payment would be unlawful.[2] The Commission did

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[1] *Columbia Gas Transmission Corp.*, 22 FERC ¶ 63,093 (1982), *aff'd*, 26 FERC ¶ 61,034 (1984), *aff'd on rehearing*, 26 FERC ¶ 61,334, *on remand*, 28 FERC ¶ 63,005, *settlement approved in*, 39 FERC ¶ 61,245 (1987).

[2] For example, the FERC now says that it might "conceivably disallow only that *portion* of the deregulated price found to represent the consideration for the dedication of regulated reserves." FERC Brief at 16, n. 18 (emphasis in original). That issue was raised by Fritz for the first time on appeal to the Fifth Circuit and directly conflicts with the FERC's lower ruling that "[t]he payment by Southern to Fritz of the price provided under the October 5, 1979 contract amendment for deregulated gas would constitute a violation of Section 270.207 of the Commission's regulations." 40 FERC ¶ 61,225 at p. 61,772. Petition for Certiorari, App. 38a.

The Commission also cites other factors. FERC Brief at 16, n. 19. However, while the state courts did find that the parties intended that the producer receive a deregulated price, it was that very intent to provide a deregulated price which caused the transaction to be illegal in the first instance. Also, the FERC did suggest, after declaring the price illegal, that the parties negotiate a price comparable to other, lawful sales to Southern. The obvious problem with this statement is that it is wholly outside the FERC's jurisdiction as it deals with the price now payable for deregulated gas untainted by any illegality. *Pennzoil Co. v. FERC*, 645 F.2d 360, 380-82 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982). For this reason and the additional reason that the FERC's suggestion would violate the parties' contract, Southern appealed this portion of the decision to the Fifth Circuit. In reply, the Commission has retreated from its position somewhat, agreeing that the statements are outside its jurisdiction but refusing to recognize them as merely dicta.

not, at that time, tell Southern that no sanctions would be imposed for payment. Why an appeal to the United States Supreme Court should trigger a change in the FERC's attitude is unexplained.

Third, to accept the FERC's suggestions would also open a Pandora's box of other possible problems. There is a companion case pending in Mississippi, *Joseph F. Fritz, Tesoro Petroleum Co. and Exxon Corp. v. Southern Natural Gas Company*, No. 9965, (Cir. Ct. of Marion Co., Miss. filed Aug. 20, 1984), involving a different well under the same contract. However, no order has yet been entered on the Section 270.207 issue and the case has been informally stayed pending this appeal. Should Southern pay under that contract and knowingly violate the law? Additionally, in the record in this case, Exxon testified that the contracting practice which led to this situation was common for Exxon. See Petition for Certiorari at 17, n. 13. That practice by Exxon did, in fact, lead to the *Columbia* case. Furthermore, the Mobil Oil group intervened before the Commission on the ground that they potentially have the same problems. *Id.* Should the gas purchaser in those cases pay as well, particularly if a state court should again ignore Commission precedent? Stated differently, does not the pendency of similar issues in other cases and in possibly other jurisdictions militate in favor of this Court accepting certiorari and resolving the issue once and for all?

3. The Loss of Substantial Monies to Southern Does Support Review.

The amounts demanded by Fritz and the other plaintiffs over and above what has already been paid are substantial (over one-half million dollars in this case and well over $1,000,000 in the companion case). Since the FERC has already ruled these payments to be illegal, it could well deny passthrough, refusing to allow Southern to include these amounts in its resale rates. Because Fritz is bankrupt, payments made to him cannot be recouped if dis-

allowed.[3] Such losses are sufficient injury to support review even if the FERC declines to also impose sanctions.

The Commission criticizes Southern's refusal to take advantage of the refund provision, claiming that the predicament imposed by Fritz' bankruptcy merely reveals an inartfully drafted contract. FERC Brief at 16-17. Of course, the refund provision does not require any payment by Southern. Additionally, even if Southern had foreseen Exxon's assignment to Fritz and Fritz' subsequent bankruptcy (an event unrelated to Southern's actions) a different contract provision would not have avoided the problem. First, a violation of Section 270.207 occurs upon payment, whether or not a refund obligation is imposed. There is simply no way for Southern to both comply with the law and the contract. Second, a contract provision to anticipate a seller's bankruptcy is unnecessary since a remedy is provided under Mississippi law—Southern may suspend payment pending adequate assurance by Fritz of the ability to refund. Miss. Code Ann. § 75-2-609 (1972). While financial losses are not necessary to Southern's appeal in light of the legal questions presented, substantial losses to Southern clearly are threatened and could not have been avoided by a different contract provision.

IV. Southern Has Taken All Appropriate Actions in This Case.

It is curious and surprising that the Commission would take the position that Southern's action has somehow been wrong or otherwise placed this case in an improper posture. For the benefit of the Court, Southern wishes to point out that Southern alone, of all the parties involved in this case, has acted properly.

First, when the parties initially became aware of the *Columbia* decision and the possible illegality of the pay-

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[3] Article 7, Section 6 of the 1979 Amendment provides that if Southern has paid a price pursuant to the contract which is later deemed not just and reasonable or which the Commission later disallows in Southern's resale rates, then the seller is obligated to make refund to Southern of the amounts so paid.

ment contemplated by this contract, it was Southern who suggested that Fritz secure a declaratory order from the Commission permitting payment. Southern recognized, even at that early stage, that a Commission ruling had primacy over the Mississippi courts on this subject. Southern even offered to escrow the disputed amounts pending such a decision. Fritz, who later explained that he did not feel that the Commission would give a "fair" interpretation of its own regulation, instead proceeded to what he viewed to be a more favorable forum—the Mississippi courts.[4] Fritz thus forced Southern to file for a declaratory order with the Commission and to seek a stay of the state court action on the basis of primary jurisdiction. When the Commission refused to decide the case during its pendency before the trial court,[5] Southern was forced to appeal to the Mississippi Supreme Court. The Commission acted only after the Mississippi Supreme Court's initial decision contrary to the *Columbia* precedent. Once the Mississippi Supreme Court overruled petitions for rehearing, ignoring the FERC's ruling, Southern was forced to appeal to this Court in order to avoid having the Mississippi Supreme Court judgment become final.

The record clearly demonstrates that Southern's only concern throughout this proceeding was compliance with the law and with its contract.[6] It was Fritz who has at-

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[4] Fritz sought actual damages as well as punitive damages for an alleged bad faith position taken by Southern. Fritz, however, could not even avoid summary judgment on his allegation that Southern's actions were prompted by something other than legitimate concern about Section 270.207. Furthermore, on appeal to the Mississippi Supreme Court, Southern was vindicated in its position on all the incidental and ancillary damage questions. Finally, when the Commission ruled that the contract payment would violate Section 270.207, Southern's concern about a possible violation was also vindicated.

[5] The Commission may have stayed its hand on the assumption that the trial court, and then Mississippi Supreme Court, would follow the law, thereby obviating the need for Commission action.

[6] Southern did appeal a portion of the FERC's ruling. However, Southern does not challenge the merits of the decision on the Section

tempted to forum shop to avoid the law and who attempted to turn Southern's legitimate legal concern into a breach of contract. It was the Commission whose delay prolonged the situation. Throughout this proceeding Southern has stood ready to pay all legal amounts required under its contract and permitted by the law. However, it has been forced by the actions of others to invest substantial time and money to avoid violating the law. This Court should not deny certiorari because of any alleged failings on Southern's part.

CONCLUSION

Southern concurs with the Commission that the Court should either vacate and remand with instructions to follow the Fifth Circuit or await the Fifth Circuit's decision, and, if affirmed, reverse the Mississippi Supreme Court. For the reasons stated, however, the Court should not deny Southern's petition.

270.207 issue properly before the Commission. Southern only challenges the Commission's further rulings which are outside its jurisdiction, dicta and contrary with the parties' contract.

Respectfully submitted,

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